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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1940.

**No. 804**

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HARRISON PARKER,

*Petitioner,*

vs.

PEOPLE OF THE STATE OF ILLINOIS.

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## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS AND BRIEF IN SUPPORT THEREOF.

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## PETITION FOR WRIT OF CERTIORARI.

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*To the Supreme Court of the United States:*

Your petitioner, Harrison Parker, respectfully alleges:

### A.

### SUMMARY STATEMENT OF THE MATTER INVOLVED.

1. The petitioner, Harrison Parker, was adjudged guilty of criminal contempt of the Criminal Court of Cook County, Illinois, on December 6, A. D. 1939, and was sen-

tenced to the Common Jail of Cook County, Illinois, for a period of ten days, having been held liable by that Court for the publication of two letters written and addressed to the Foreman of the Cook County Grand Jury and certain members of the Grand Jury then and there sitting in Cook County, Illinois, the contents of which said letters are set up *verbatim* in the information charging the contempt (R. 3-7; 11-19).

2. The judgment of conviction was affirmed by the Court below, the Supreme Court of the State of Illinois, on October 11, 1940, and became final on December 4, 1940, when that Court denied petitioner's application for rehearing.

3. These letters set forth information relating to violations of the criminal laws of Illinois on matters not then pending before that Grand Jury.

4. The constitutional questions raised by this petition for a writ of *certiorari* are:

(a) Whether the petitioner has been deprived of a constitutional right to inform the Grand Jury of his County, on a non-pending matter, of a violation of the criminal laws of the State, and

(b) Whether he has been deprived of freedom of speech, freedom of the press, the right to petition the Government for a redress of grievances and due process of law, as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.

## B.

## REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

At the bar of the Courts of Illinois, the petitioner urged that he had a constitutional right to inform the Grand Jury of violations of criminal laws of the State in and concerning matters not then pending before the said Grand Jury, and that the judgment of conviction for contempt of court abridged his freedom of speech and freedom of the press by violating two standards applicable to free speech cases generally, and to contempt of court by publication, as well:

(1) the "actual obstruction" rule first espoused by Justices Holmes and Brandeis, in dissent, in *Toledo Newspaper Company* v. *U. S.*, 247 U. S. 402, 422; adopted by the Supreme Courts of South Dakota and Indiana, (in *State* v. *American News*, 64 S. D. 385, and *Nixon* v. *State*, 207 Ind. 426, respectively); and

(2) the "clear and present danger" rule, first delineated by Justice Holmes in *Schenck* v. *U. S.*, 249 U. S. 52; in effect abandoned by this Court in *Gitlow* v. *New York*, 268 U. S. 652, over the dissenting protests of Justices Holmes and Brandeis; reasserted by Justice Brandeis in *Whitney* v. *California*, 274 U. S. 357; and finally readopted by this Court in *Herndon* v. *Lowrey*, 301 U. S. 242.

The petitioner contends that a standard of guilt upon a charge of contempt of court by publication short of the "actual obstruction" principle, or the "clear and present danger" rule, denies due process, and that, particularly, the view adopted by the trial Court and the Supreme Court of the State of Illinois, to wit, that the petitioner was guilty of "acts and conduct directly calculated to

impede, embarrass and obstruct the Court in the due administration of justice", as the result of the letters written by him to the Grand Jury, which acts "had a tendency to directly impede, embarrass or obstruct the Grand Jury" (R. 37) fixes such "vague and indeterminate boundaries" as to constitute a "dragnet which may enmesh anyone" exercising his constitutional right of freedom of speech, quite as much as to the "vague and indeterminate" standard announced by the Courts of the State of Georgia, and rejected by this Court in *Herndon* v. *Lowrey,* 301 U. S. 242.

This petition presents to this Court for determination the principles of freedom of speech and of the press as applicable to the judiciary; and, particularly, these principles as applicable to constructive contempt by publication. This Court in recent years has stoutly upheld freedom of expression, so ably characterized by Mr. Justice Cardozo in *Palko* v. *Conn.,* 302 U. S. 219, as "the matrix, the indispensable condition of nearly every form of freedom", and this Court's opinions and decisions have all been in the line of protection and extension of freedom of speech and of the press.

In these free speech cases, the issue was the constitutional limit to legislative and executive authority, when the legislature and executive came into conflict with the right of the individual to freedom of expression.

*Herndon* v. *Lowrey,* 301 U. S. 242;
*Lovell* v. *Griffin,* 303 U. S. 444;
*Hague* v. *C. I. O.,* 307 U. S. 496;
*Schneider* v. *Irvington,* 308 U. S. 147, 60 Sup. Ct. Rep. 146.

Until *certiorari* was allowed in the case of *Bridges* v. *The State of California,* it was almost 35 years since this

Court reviewed a judgment of contempt by a State Court. The case of *Toledo Newspaper Co.* v. *U. S.*, 247 U. S. 402, decided some 23 years ago, was apparently the last time this Court dealt with a problem of constructive contempt by publication upon the merits.

The case at bar asks consideration of the problem of the constitutional limit, if any, to the authority of the judiciary, when the Courts of the nation come into conflict with the rights of the people to free speech and a free press.

Since the last consideration of the problem by this Court of the applicable principles of free speech and free press to publications affecting the judiciary, the State Courts have expressed views and adopted standards that are hopelessly conflicting and irreconcilable, as disclosed by the adoption of the "actual obstruction" principle by the Courts of South Dakota and Indiana, on the one hand, and the adherence to the "tendency" doctrine in California and in the Court below of "acts of conduct directly calculated to impede, embarrass and obstruct" the Court.

The instant case presents likewise an aspect of such conflict which calls for clarification and authoritative determination by this Court.

In the recent free speech cases this Court has carefully fixed the boundaries of free speech in the field of political issues. He who undertakes to exercise his constitutional right in the matter of political issues knows with reasonable certainty when he is running afoul of the law, and when the Constitution of the United States may no longer afford him a shield.

Until, and unless there is similar clarification by this Court upon the subject of contempt by publication of letters to a Grand Jury, one who dares to assert his consti-

tutional right of freedom of expression, and of informing the Grand Jury of violations of law in matters not then pending before it, runs the risk of being "enmeshed" by the "dragnet" of the "vague and indefinite boundaries to such speech set up by the Courts of Illinois".

This petition raises the important question of Federal constitutional law, involving freedom of speech and of the press—rights which this Court has deemed "fundamental personal rights and liberties" (*Schneider* v. *Irvington*, 308 U. S. 147, 60 Sup. Ct. Rep. 146).

The petitioner contends that if such characterization of those rights is not to be "an empty phrase", as affecting his freedom of speech, this Court should review the judgment of conviction of the petitioner for an alleged contempt of the Criminal Court of Cook County, Illinois, which judgment of conviction the petitioner claims abridges his constitutional right to freedom of speech and of the press, as well as his constitutional right as a citizen having no official connection with the Grand Jury, without any previous authorization, to address a written communication to that body, informing it of evidence of crime in the possession and within the knowledge of himself, which he offers to deliver and make known to the Grand Jury on a subject not then before it for deliberation and decision, and in which he charges that the State's Attorney refuses to bring the evidence of said crime before it because of his own complicity therein.

HARRISON PARKER,
*Petitioner.*

By IRVING BREAKSTONE,
*Counsel for Petitioner.*

# Supreme Court of the United States

OCTOBER TERM, 1940.

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---

## BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

---

### I.

### OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of Illinois is reported in 374 Illinois 524.

### II.

### JURISDICTION.

**1. The Statutory Provisions Sustaining Jurisdiction.**

Jurisdiction of this Court is invoked under Judicial Code, Sec. 237b, as amended by Act of February 13, 1925, 43 Stats. 937; Title 28, Sec. 344 (b) Code of Laws of the U. S. 1934 Edition.

### 2. Finality of Judgment.

The judgment forming the basis of the petition is final both in form and substance and disposes of all the elements of the controversy in the Court below.

### 3. Petition Timely Filed.

The final judgment of the Supreme Court of Illinois was entered on December 4, 1940. Prior thereto the petitioner had timely filed a petition for rehearing with the Court below, which petition the Court considered, and on December 4, 1940, denied; the order of the Supreme Court of Illinois, affirming the judgment of the Illinois Trial Court, to-wit, the Criminal Court of Cook County, Illinois, adjudging the petitioner guilty of contempt of Court by publication, was made on October 11, 1940 (R. 49-50).

### 4. Judgment of the Highest Court.

The Supreme Court of the State of Illinois is the highest Illinois Court.

### 5. Cases Sustaining Jurisdiction.

The following cases, among others, sustain the jurisdiction:

*Schneider* v. *Irvington*, 308 U. S. 147, 60 Sup. Ct. 146,

and cases cited therein.

## III.

## STATEMENT OF THE CASE.

A summary statement of the case has been given under heading "A" of the Petition for Writ of *Certiorari.*

On December 6, 1939, the petitioner, HARRISON PARKER, was convicted and sentenced to the Common Jail of Cook County, Illinois, for a period of ten (10) days for criminal contempt of the Criminal Court of Cook County, Illinois.

The conviction was had upon an Information (R. 1-22) filed by the State's Attorney of Cook County, Illinois, pursuant to leave of Court first had and obtained, which charged the petitioner with having written two letters addressed to the Foreman of the Cook County Grand Jury on October 4, 1939, and October 17, 1939, the contents of which said letters are set out *verbatim* in the Information (R. 3-7, 11-19), and which said letters were also addressed and sent to the members of the Grand Jury then and there sitting in Cook County, Illinois.

The Information sets up the legality of the Grand Jury to the members of which the communications were sent, charged that a previous Information had been filed, and a rule to show cause issued against the petitioner for the writing of the first letter of October 4th, and charged that in the interim the petitioner wrote to the said Grand Jury and its Foreman the second letter of October 17th, which is set out *in extenso* in the said Information (R. 11-19).

The petitioner filed a written motion to dismiss the said Information and to discharge the rule to show cause entered thereon (R. 24-25).

An order was entered overruling the motion to dismiss the Information, whereupon the petitioner filed his answer.

The Answer (R. 26-34) of the petitioner, among other things, stated that he had a constitutional right and a duty as a citizen to write the letters and communicate the contents thereof to the members of the Grand Jury as set forth in the Information. The Answer recites the honesty of petitioner's motive in writing the communications in question, and calling the attention of the Grand Jury to a conspiracy to destroy the mandate of the Revenue Act of Illinois, committed against the People of the State of Illinois, as therein alleged, by the State's Attorney and the Assessor of Cook County, Illinois, in aid of the Tribune Company and its attorneys, and recites the verification of the first Information, by one, Norkett, an employee of the Tribune Company and its attorneys, referred to in the Information in question in this cause, and during the interim between the filing of which and the present Information the petitioner wrote his second communication to the members of the Grand Jury. The Answer recited the duty which the petitioner and other citizens owed to make discovery of the matters and things in question contained in the letter set forth in the Information to the Grand Jury. The Answer further sets forth exculpatory allegations concerning petitioner's motives, and claimed that the contents of the letters were privileged.

The Court found that the petitioner "is guilty of acts and conduct directly calculated to impede, embarrass and obstruct this Court in the due administration of justice, and that because of said acts and conduct on the part of the said HARRISON PARKER, he, the said HARRISON PARKER, is guilty of a contempt of this Court" (R. 37).

The Court then imposed sentence of ten (10) days in the Common Jail of Cook County upon the petitioner.

No testimony was taken and the matter was disposed of upon the Information and Answer, the matters and things of which the Grand Jury was advised in the letters not then being under investigation by the Grand Jury, and no matters of and concerning the same or of and concerning the petitioner being then pending before the Grand Jury at the time of its receipt of the two letters in question.

## IV.

## SPECIFICATION OF ERRORS.

The petitioner assigns the following errors in the record and proceedings below:

The Supreme Court of Illinois erred in its decision and judgment, in the following particulars:

1. In ruling that the petitioner had no constitutional right or duty as a citizen having no official communication with the Grand Jury, without any previous authorization, to address a written communication to that body, informing it of evidence of crime in the possession and within the knowledge of the writer, which he offered to deliver and make known to the Grand Jury, on a subject not then before it for deliberation and decision, and which charged that the State's Attorney refused to bring the evidence of said crime before it because of his own complicity therein.

2. In ruling that the judgment of conviction of the petitioner for contempt of Court by publication does not deprive the petitioner of due process of law under the Fourteenth Amendment to the Constitution of the United States of America, by impairing the petitioner's right to

freedom of speech and freedom of the press, as guaranteed by said due process clause; and particularly,

(a) in rejecting the "actual obstruction" principle,

(b) in refusing to apply the "clear and present danger" rule, and

(c) in applying the "tendency" test; such latter test being "too vague and indefinite" to constitute an adequate standard of guilt.

3. In ruling that the judgment of contempt does not deprive petitioner of due process of law, by denying to the petitioner the right to petition the Government for a redress of grievances.

4. In ruling that the contempt judgment is supported by evidence sufficient to sustain a conviction, such a ruling deprives the petitioner of liberty and property without due process of law.

## V.

## SUMMARY OF ARGUMENT.

### Point 1.

Petitioner had a constitutional right to address the two communications in question to the Grand Jury set forth in the Information, and it was his duty as a citizen to inform the Grand Jury of the violation of the Internal Revenue Laws of the State of Illinois and the evidence he possessed in proof of the charge.

### Point 2.

The "tendency" test, applied by the Illinois Courts to publication pertaining to issues not then pending in the Courts, and not then pending before the Grand Jury, is too vague and indefinite; as such it offends due process of law and deprived the petitioner of freedom of speech and freedom of the press, as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.

The "actual obstruction" principle, and "clear and present danger" rule applies to publications alleged to be in contempt of Court.

### Point 3.

The petitioner was deprived of due process of law and freedom of speech and of the press, in that the judgment of conviction of contempt of Court denied the petitioner the right to petition the Government for a redress of grievances.

### Point 4.

There is no evidence to support the conviction of contempt. A contempt judgment, based upon a publication, of and concerning matters not then pending in the Court, in the absence of supporting evidence, denies Federal due process.

## VI.

## ARGUMENT.

---

### Point 1.

The first subject of inquiry in the consideration of this cause is the general proposition, whether any citizen having no official connection with the Grand Jury, has a legal right, without any previous authorization, to address a written communication to that body, informing it of evidence of crime in the possession and within the knowledge of the writer, which he offers to make known to the Grand Jury on a subject not then before it for deliberation and decision, and which charges that the State's Attorney refuses to bring the evidence of said crime before the Grand Jury, because of his own complicity therein.

If such a right exists, it must be common to every citizen of the State. The petitioner cannot claim any peculiar privilege in this particular; it belongs of right to all, or it pertains to none.

In the case of *In Re: Quarles,* 158 U. S. 1080, this Court said that it is the constitutional right of every private citizen of the United States to inform a Marshal of the United States, or his Deputy, of a violation of the Internal Revenue Laws of the United States, and by Mr. Justice Gray, at page 535, specifically said:

> "It is the duty and the right, not only of every peace officer of the United States, but of every citizen, to assist in prosecuting and in securing the punishment of, any breach of the peace of the United States. It is the right, as well as the duty, of every citizen, when called upon by the proper officer, to act as part

of the *posse comitatus* in upholding the laws of his country. It is likewise his right and his duty to communicate to the executive officers any information which he has of the commission of an offense against those laws; and such information, given by a private citizen is a privileged and confidential communication for which no action of libel or slander will lie, and the disclosure of which cannot be compelled without the assent of the government. *Vogel* v. *Gruaz,* 110 U. S. 311; *United States* v. *Moses,* 4 Wash. C. C. 726; *Worthington* v. *Scribner,* 109 Mass. 487.

"The right of the citizen informing of a violation of law * * * does not depend upon any of the Amendments to the Constitution, but arises out of the creation and establishment by the Constitution itself of a national government paramount and supreme within its sphere of action. *United States* v. *Logan,* 144 U. S. 294.

"Both are, within the concise definition of the Chief Justice in an earlier case 'privileges and immunities arising out of the nature and essential character of the national government and granted or secured by the Constitution of the United States.' *In re: Kemmler,* 136 U. S. 436, 448."

This Court in *Vogel* v. *Gruaz,* 110 U. S. 311, in holding a communication to a State's Attorney, in Illinois, absolutely privileged in a suit to recover damages for libel, among other things, said:

"The avenue to the grand jury should always be free and unobstructed. Bircher might have gone directly before it, without consulting with Mr. Cook, but if he chose to consult him, instead of a private counsel, there was great propriety in his doing so."

This doctrine was approved in the following cases:

*Gabriel* v. *McMullin,* 127 Ia. 429; 103 N. W. 356;
*Michael* v. *Matson,* 81 Kan. 367, L. R. A. 1915 D1; 105 Pac. 540;
*Schultz* v. *Strauss,* 127 Wis. 331, 106 N. W. 1068.

To the same effect see the following:

*Kidder* v. *Parkhurst,* 3 Allen, 393;
*Klinch* v. *Colby,* 46 N. Y. 430;
*Vandezee* v. *McGregor,* 12 Wend. 545;
*Lake* v. *King,* 1 Mod. 58.

In the case of *Hott* v. *Yarbrough,* 245 S. W. 676 (Texas), a defendant was sued for libel on the basis of the contents of a letter sent by him to the Grand Jury. The Court held that there was no liability on the part of the defendant, and denied any relief to the plaintiff because the communication in question was privileged. Among other things, the Court said:

> "That the Grand Jury is an arm of the Court, and a part of the judicial system for the administration of the criminal law, is not open to question; from which it necessarily follows that any communication made to the Grand Jury in the regular performance of its duties is absolutely privileged, and cannot constitute the basis of a civil suit for damages. * * *
>
> It is unquestionably the right, if not, in fact, the duty, of everyone who has knowledge of the commission of a criminal offense, punishment to the party guilty whereof is a matter of general public interest, to call to the attention of the Grand Jury the facts within his knowledge to the end that they may have proper investigation, and such action as the grand jury may deem advisable. Equally clear is the right of any one who may consider himself aggrieved by the actual or supposed commission of a crime to call the matter to the attention of the grand jury for investigation and action. The law does not restrict the method by which this may be done. But, whenever it is done, by whatever method, so long as it is confined to a communication directly to the grand jury itself or to one of its members acting in his official capacity, it is clearly a part of a judicial proceeding, pertains to the proper administration of criminal justice, is absolutely privileged, and cannot be the basis of a civil action for damages."

We cannot pass the case without also calling to this Court's attention the following significant paragraph therefrom:

> "It may not be amiss to state in this connection that, had the letter been treated with that secrecy which the law enjoins, its contents would have gone no further than the grand jury room, and this action would never have been brought."

The length to which our Courts have gone in the extension of the doctrine of privilege, in connection with language used in proceedings in the regular course of justice, is nowhere better illustrated than in the case of *Parker* v. *Kirkland,* 298 Ill. App. 340. An exhaustive survey of the entire field is therein had.

In *Hale* v. *Henkel,* 201 U. S. 43, 61, the Court said:

> "It has been alleged, that Grand Juries are confined in their inquiries to the bills offered to them, to the crimes given them in charge, and the evidence brought before them by the prosecutor. But these conceptions are much too contracted; they present but a very imperfect and unsatisfactory view of the duty required from grand jurors, and of the trust reposed in them. They are not appointed for the prosecutor or for the court, they are appointed for the government and for the people; and of both the government and the people it is surely the concernment that, on one hand, all crimes whether given or not given in charge, whether described with professional skill should receive the punishment which the law announces."

The late Federal Judge George A. Carpenter of the United States District Court for the Northern District of Illinois, on November 1, 1915, said in an instruction of a Grand Jury:

> "Gentlemen of the Jury: You understand your duty. It is one of the most sacred duties in our form of government. I want to impress upon you particularly that you are not under the direction of anybody. You are not required to follow either the instructions of the district attorney or the court. The court and the district attorney will advise you as to the law, but you are free to follow your own judgment as to what shall or shall not be done. You are to examine the evidence and information anywhere. You are not hampered by the ordinary legal rules. Your door is open to any citizen who may have complaints to make or may wish to give you information concerning crimes."

In *Fishback* v. *State,* 131 Ind. 304, 30 N. E. 1088 (1892), a newspaper editor was accused of contempt in attacking a Judge and the Grand Jury. Among other things the Court said:

> "The public press has rights with which no court has power to interfere * * * and it is legitimate and proper for the press to call the attention of the grand jury to violations of the law believed to have been committed and ask for an investigation," etc.

The use of the word "believed" in the sentence above quoted is of especial significance in the case at bar, and the application of the quoted case to it. The right of the press is the same as that of the private citizen, and what the press is privileged to do, so also is the citizen.

In *Hartwell* v. *State,* 10 (Lea) Tenn. 544, the Court held that the defendant could not be cited for contempt, for interfering with the functions of the Grand Jury, where the evidence showed that such interference was made in good faith—malice and corrupt intention lacking. In this case, the defendant communicated directly with a grand juror concerning a matter pending before the Grand Jury, and under investigation by it.

In the case of *In re Lester,* 77 Ga. 143 (1886), the Court said:

> "It is the right of any citizen or any individual of lawful age to come forward and prosecute for offenses against the state, or when he does not wish to become the prosecutor, he may give information of the fact to the grand jury, or any member of the body, and in either case, it will become their duty to investigate the matter thus communicated to them, or made known to one of them, whose obligation it would be to lay his information before that body."

In the case of *State* v. *Stewart,* 46 La. Ann. 1164, 14 So. 143 (1893), the Court said:

> "It is complained by the defendant that one S. A. Morgan, the leading state witness, went without summons or request before the grand jury, and gave his own version of the case against the defendant, and instituted this prosecution. The witness had the undoubted right to go before the grand jury voluntarily and disclose his knowledge of the case. As a good citizen, it was his duty to do so. No one can be excused for withholding knowledge of a crime from the public until he is summoned to give his testimony of its commission."

In the case at bar no wrong was intended or done to the Grand Jury or the Criminal Court of Cook County, nothing violative of defendant's duty and obligations as a citizen was attempted; nothing corrupt, fraudulent or any intentional rudeness or insult to the Grand Jury or the Court is here involved.

## Point 2.

**The "tendency" test, applied by the Illinois Courts to publication pertaining to issues pending in the Courts, is too vague and indefinite; and as such it offends due process of law and deprives the petitioner of freedom of speech and freedom of the press, as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.**

The "actual obstruction" principle, and "clear and present danger" rule applies to publications alleged to be in contempt of court.

The Illinois Supreme Court adopted the "tendency" rule and applied it to the evidence finding the petitioner guilty of contempt (R. 46).

The Supreme Court of Illinois expressly rejected two tests urged upon it by petitioner to be required by the constitutional guarantees of freedom of expression; namely, the "actual obstruction" principle and the "clear and present danger" rule.

The classic criticism of the "tendency" doctrine, as a test of the legality and constitutionality of utterances in general, is contained in Jefferson's Virginia Statute on Religious Liberty, quoted by this Court in *Reynolds* v. *U. S.*, 98 U. S. 145, 163:

> "To suffer the civil magistrate to intrude his power into the field of opinion, or to restrain the profession or propagation of principles, on supposition of their ill tendency is a dangerous fallacy, which at once destroys all liberty, because he, being, of course, judge of that tendency, will make his opinions the rule of judgment and approve or condemn the sentiments of others only as they shall square with or differ from his own."

This point of view is substantially adopted by this Court in *Herndon* v. *Lowrey,* 301 U. S. 242, in which the "dangerous tendency" view was rejected as "too vague and indefinite" a test, since such standard permitted punishment of the "fair use of the opportunity for expression of political opinion". A yardstick shorter than the "clear and present danger" rule, this Court ruled, "licenses the jury to create its own standard of guilt in each case", leaves the whole case to the pure "speculation" of a jury, and "permits the punishment of all utterances when unjust and unreasonable in the estimation of a court and jury". Such "vague and indeterminate boundaries", this Court held to constitute a "dragnet which may immesh anyone" who dared to exercise his constitutional right of freedom of speech.

In the case of the *Times-Mirror Company* v. *Superior Court of the State of California,* 99 Cal. Dec. 108, the "tendency" doctrine is effectively refuted by Justice Gibson in the court below in his dissenting opinion as follows:

> "The test adopted by the majority opinion is the tendency of the publication to influence the proceeding. Under this test the inquiry is not as to what happened, but as to what might have happened. It is the supposed tendency of the publication to affect and not its actual effect which is involved. It is not the trial judge himself, but a hypothetical judge with whom the test is concerned. Denial by the accused of any intention to influence is futile, since the tendency alone is considered. Denial by the judge that he was in fact influenced is likewise no defense, and indeed is not even relevant. It is not material to inquire whether the publication was seen or read by the judge or jury, since this would throw light only upon its actual effect.
>
> "This test is so vague and elastic, varying with the viewpoint of the individual judge who cites the offender, that it necessarily places an unreasonable re-

straint upon free speech and press. In the first place, the establishment of so loose a rule provides a temptation for the judge to invoke the power over contempt as a means of prohibiting political or personal attacks upon him or his views. We are all well aware of the constantly broadening scope of the judiciary as an interpreter of constitutional and statutory policies in the field of government, and there is grave danger in permitting a court to ward off criticisms directed at its policies, under the guise of protecting a particular court proceeding from improper influences. * * *

"In the second place the test permits the placing of restraints on speech and press as varied as the sensitivities of a particular judge."

Justice Gibson urged the adoption of the "actual obstruction" principles, quoting with approval from, and following, *State* v. *American News Co.*, 64 S. D. 385.

The views expressed by Justice Gibson are substantially those of Justices Holmes and Brandeis in their dissent in the *Toledo* case, in which those justices urged a reversal of a judgment of contempt on the ground that "there was no emergency" and "there was nothing to warrant a finding that the administration of justice was obstructed".

*Nixon* v. *State*, 207 Ind. 426, is in accord.

**(a) The application of the "actual obstruction" principle to petitioner.**

There is no claim in the contempt charges against the petitioner, no evidence admitted in the course of the trial, nor any finding by the trial court or the court below, of an "actual obstruction", or actual interference with the administration of justice. Both the trial court and the Supreme Court of Illinois ruled that no such showing was necessary (R. 40, 46-48).

The adoption and application by this Court of the "actual obstruction" principle would require a reversal of the judgment of conviction.

**(b) The "clear and present danger" rule, applied to publication alleged to be in contempt of court; and applied to the petitioner.**

First entering the mansions of the law in 1917 (*Schenck* v. *U. S.*, 249 U. S. 52) (1937), (*Herndon* v. *Lowrey*, 301 U. S. 242), its classic and most comprehensive expression is by Justice Brandeis in his (and Justice Holmes') concurring opinion in *Whitney* v. *California*, 274 U. S. 357, Justice Brandeis declaring:

> "That the necessity which is essential to a valid restriction does not exist unless speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the state constitutionally may seek to prevent has been settled."

The court below, however, expressly rejected this test as applicable to alleged contempt by publication and refused to apply the rule to petitioner (R. 47-48).

That the state (the government) has both the right and the duty to protect itself from destruction is beyond doubt. Yet the state, it is now determined by this Court, may not penalize utterances and publications "tending" to destroy the government; that the courts have the authority and the obligation to safeguard themselves from obstructions, interferences and outside influences concerning pending cases, is equally settled; *a fortiori*, the courts may not, without invading constitutional guarantees of freedom of speech and of the press, punish publications merely "tending" to obstruct, or tending improperly to influence the courts.

Interferences with the judiciary admittedly constitute "substantive evils", which the courts may constitutionally penalize.

In dealing with evils the Congress of the United States and the legislatures of the states may penalize the expression of opinions, only when "there is a clear and present danger that they will bring about substantive evils".

We are unable to apprehend any distinction, either in fact or in law, which would make the judiciary immune from these constitutional limitations, and authorize the courts to take steps in self-protection against interferences and embarrassments which the legislatures may not take to protect the state and federal governments from threatened destruction by force and violence.

In our opinion, the constitutional limitations upon legislative and executive authority apply with equal, if not greater, force against judicial exercise of the contempt power when that authority is asserted against mere utterance and publication.

The legislation considered by this Court in the cases in which the "clear and present danger" rule was evolved and formulated were all intended to protect the government; state criminal syndicalism acts, criminal anarchy laws, and sedition laws to preserve the state governments from destruction by force and violence; the federal Espionage Act, enacted by Congress to protect the federal government and its agencies from interference during the great emergency of the World War. (*Schenck* v. *U. S.*, 249 U. S. 52). The judiciary constitutes one branch of our government; no matter how admittedly important or indispensable a part of that government, the courts have no greater power to protect themselves from interferences than the whole government has to preserve itself from destruction. The part can have no greater authority of self-protection than does the whole.

If this Court adopts and applies the "clear and present danger" rule to alleged contempts by publication, we suggest the following elements as essential to sustain a judgment of conviction for contempt:

(a) The publication must have come to the attention of the judge or Grand Jury before whom the cause is pending.

(b) There must be evidence of, and a finding of, an express intent to influence the judge or Grand Jury. A communication to a Grand Jury by letter concerning evidence of crime in connection with a matter not then pending before it, constitutes an exercise of the right to freedom of the press; communication to the Grand Jury (whether successful or unsuccessful) concerning a pending matter constitutes the abuse, which may be penalized.

> "* * * Legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed." *DeJonge* v. *Ore.*, 299 U. S. 353.

Judicial intervention should be measured by the same standard as legislative intervention.

> "We should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country," (Justice Holmes, dissenting, in *Abrams* v. *U. S.*, 250 U. S. 616, 624).

This principle should apply to the judges and Grand Jurors as well as to the legislators.

(c) The contents of the publication must be such as would influence a judge or Grand Juror of ordinary firmness and fortitude.

Applied to the instant case, the "clear and present danger" rule would require annulling the judgment of conviction and a ruling that the judgment abridges free speech.

Freedom of speech includes the right to criticize and to inform.

> "* * * If there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us, but freedom for the thought that we hate." (Justice Holmes, dissenting, in *U. S.* v. *Schwimmer*, 279 U. S. 644, 653.)

**Point 3.**

**The petitioner was deprived of due process of law and freedom of speech and of the press, in that the conviction of contempt of Court denied the petitioner the right to petition the Government for a redress of grievances.**

The right to communicate by letter with a Grand Jury advising them of a violation of the Revenue Laws of the State of Illinois, and the right of publicity necessarily attached in the writing of the letter to the several Grand Jurors, is merely a manifestation of the right to petition the government for a redress of grievances.

This right is one of the oldest and one of the most universally accepted, of the common law political rights of Englishmen and Americans. It is specially incorporated in and guaranteed by the First Amendment.

> 2 Story, Commentaries on the Constitution (5th edition), Sections 1894-1895;
>
> 1 Cooley, Constitutional Limitations (8th edition), pages 728, 729.

There should be no doubt that it is guaranteed and protected by the Fourteenth Amendment. Certain it is

that there is a widespread, and justified, belief that "neither liberty nor justice" would exist if it "were sacrificed". (*Palko* v. *Conn.*, 302 U. S. 219.)

The petitioner, as a citizen of the State of Illinois, manifestly believed that the State was being defrauded of its lawful revenue through a conspiracy which involved the elected public officials of Cook County, the Tribune Company and its attorneys; in communicating with the Grand Jury of Cook County, admittedly an appropriate state judicial agency to whom the people of the State had delegated authority to investigate the alleged commission of criminal offenses and to prevent the frustration of the crimial law, the petitioner was exercising the modern right of petitioning the government for a redress of grievances.

Such right to petition necessarily includes the right to do so publicly.

In its very essence, a petition to the government is a public, not a private, matter. It is necessarily a matter of public record. Suppression or concealment of petitions to the government would be contrary to the fundamental democratic principle upon which this very right is based. Going a step further, this prerogative is a basic element of a democratic form of government; such a form of government requires the conduct of public affairs publicly. Therefore to deny, that the right to publish a petition is inherent in and corollary to the right to petition, is effectually to deny and nullify the right itself.

That there are limits to the exercise of this right, as to all rights, constitutional or otherwise, is not denied. In the absence of a showing of an express intent to influence or embarrass proceedings in a State Court, however, punishment for the public exercise of the right to petition abridges that right, in defiance of constitutional guarantees.

## Point 4.

**There is no evidence to support the conviction of contempt. A contempt judgment, based upon a publication, in the absence of supporting evidence, denies Federal due process.**

This Court will review the evidence when a Federal right has been specially set up, and claimed in a State Court.

*Norris* v. *Alabama,* 294 U. S. 587;
*Pierre* v. *Louisiana,* 306 U. S. 354.

An examination of the letter of the petitioner to the Grand Jury of October 4, 1939 (R. 3-7), discloses a statement by the petitioner to the effect that he possesses certain information, which he offers to deliver to the Grand Jury, to the effect that the State's Attorney of Cook County is implicated in a criminal conspiracy to rob the State of Illinois of $43,000,000.00; that he is guilty of malfeasance in office; and that the Statute of Limitations has not run. The two succeeding paragraphs recite a history of an alleged analogous situation in California. The succeeding paragraphs purport to explain the nature of the evidence possessed by the petitioner and referred to by him in the first paragraph. Page 2 of the letter deals with alleged crimes committed by the Chicago Tribune and contains libelous but privileged matter concerning Robert R. McCormick, President of the Tribune Company, together with a history of alleged tax frauds perpetrated by him and his attorneys, coupled with the alleged effect of all these acts upon the social and industrial life of the State, coupled with complicity of the State's Attorney of Cook County.

On page 3 the self-same matter is continued, and reference is made to the possibility that pressure would be brought upon the Grand Jury to ignore the letter in ques-

tion. Reference is made to alleged attempts upon the life of the writer by reason of his activity in bringing the evidence of these alleged crimes to the light of day. The writer offers to appear before the Grand Jury and present the evidence, which he has gathered, in such form as the Grand Jury would require, subject to the pains and penalties of the law, in the event of his failure to submit legal evidence of the truth of his charges. In closing, reference is made to alleged analogous situations in other jurisdictions.

In the letter of October 17, 1939, the opening paragraph is practically the same as the letter of October 4th, save that it involves John S. Clark, the Cook County Assessor, as a party to the alleged criminal conspiracy.

The second paragraph deals with the same subject matter as the first letter, save that it involves the Cook County Assessor rather than the State's Attorney, and proceeds to give the effects of the alleged criminal conspiracy upon the taxpayers of Illinois. Reference is made in the letters to Robert R. McCormick, the Tribune Company, and its attorney, Weymouth Kirkland. The letter purports to explain the methods of evasion of the payment of the legal personal property taxes assessed against the Tribune Company, and of the participation therein by the persons mentioned in the letter, including the Cook County Assessor.

Page 4 of the letter contains an offer on the part of the petitioner to appear before the Grand Jury in similar manner and form as his letter of October 4, 1939. The effects of the alleged conspiracy are then described.

The writer then adverts to his attempt to obtain action in reference to the alleged conspiracy by communication

to the State's Attorney, and charges that by reason of participation in the conspiracy by the State's Attorney of Cook County, the effort was futile.

The writer refers to his duty to inform the Grand Jury of the conspiracy. He states that the oath to which the Foreman of the Grand Jury swore implied an "invitation to all decent citizens to inform the Grand Jury of any offenses against the common weal". He states he writes to the Grand Jury because the State's Attorney "will not assert the law against the Chicago Tribune".

The writer in closing extols his motives and the reasons which prompt him to write the letter in question, and predicts that if he is permitted to appear before the Grand Jury "it is reasonably certain, that the Grand Jury would return some indictments which will result in some convictions," etc. A postscript is added containing statements which are privileged in character as hereinbefore set forth.

Nowhere, in either of the letters contained in the Information, does the petitioner ask the Grand Jury to indict anyone, and nowhere does he seek to influence or control their acts. He simply says he has evidence, and would the Grand Jury go into the matter further, he will be at hand to furnish and deliver what he says he has.

He does not seek to instruct the Grand Jury nor to exculpate himself or anyone else.

Nowhere, in either of the letters, is there to be found any language indicative of any bold attempt or effort to obstruct an honest and fair administration of justice, through the action of the Grand Jury, but on the contrary they cry out for just that, because of the claimed conspiracy of the State's Attorney with the corporation and other persons to emasculate the Revenue Act of Illinois, and

cheat and defraud the State out of the tax revenues lawfully due.

The language of the letters is calculated to aid, rather than impede, the grand inquest of the county in the performance of its duties incident to its office. The disposition of the writer is not to influence the Grand Jury, but to give it information, if it desires the same, which would determine whether or not the charges made by the writer were or were not true, and meriting indictment or a no bill. Here there is no corrupting influence attempted to be exercised over the minds of the Grand Jury. On the contrary, the corrupting influence is said, in the letters, to be exercised by the State's Attorney and his co-conspirators. The intentions of the petitioner were purely innocent, and he had no design of violating any law.

Nowhere in the information is it charged that the said letters were calculated to impede, embarrass, obstruct or hinder the administration of justice or the action of the Grand Jury, or to wrongfully influence the Grand Jury.

Nowhere, in the information, is it said that the matter in question, mentioned in the said letters, was in anywise before the Grand Jury for investigation, or that it was likely that it would come before them. On the contrary, the Judge below who convicted the petitioner, said it was admitted that such was not the case (R. 40). Nowhere in the information is there to be found any allegation that any statement made in either of the letters is false or untrue.

A contempt proceeding is essentially criminal and penal in nature.

*Gompers* v. *U. S.*, 233 U. S. 604, 610.
*Michaelson* v. *U. S.*, 261 U. S. 42.

The sentence imposed upon the petitioner by the trial Court was penal. He was given a jail sentence. Nowhere

does the Information charge that there was any malevolent intention, on the part of the petitioner, to lower or assail the dignity of the Court, or that his acts and conduct were calculated to impede, embarrass or obstruct the Court in the administration of justice. On the contrary, the Information expressly disavows any intention other than what is honorable and worthy on its face, because the letters, which are set out *verbatim* in the Information, are replete with explanatory matter concerning the motives and the nature of the intention of the writer to aid and assist the Grand Jury in its investigation and in the administration of the law. The answer disavows any such malevolent intention of whatsoever name, nature or description completely, and to all intents and purposes so as to conclusively negative the required malevolent intention, which must exist as a condition precedent to any liability as set forth in the judgment of the Court. The petitioner is presumed to be innocent; here, he is actually innocent.

A judgment of conviction of contempt in the absence and failure of proof of participation in any contempt by petitioner, as in the case at bar, denies due process. *Hoover* v. *Wise,* 91 U. S. 308.

## VII.

## Conclusion.

The Petition for a Writ of *Certiorari* should be granted.

Respectfully submitted,

IRVING BREAKSTONE,
*Attorney for Petitioner.*

(20)

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CLERK

IN THE

# *Supreme Court of the United States*

OCTOBER TERM, A. D. 1940

## *No. 804*

HARRISON PARKER,

*Petitioner,*

*vs.*

PEOPLE OF THE STATE OF ILLINOIS,

*Respondent.*

---

## BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR REVIEW ON WRIT OF CERTIORARI

---

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IN THE

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No. 804

HARRISON PARKER,

*Petitioner,*

*vs.*

PEOPLE OF THE STATE OF ILLINOIS,

*Respondent.*

## BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR REVIEW ON WRIT OF CERTIORARI

## SUMMARY OF ARGUMENT.

## PROPOSITIONS OF LAW and AUTHORITIES RELIED UPON.

### I.

**Inasmuch as the record discloses that no federal question was raised, considered or passed upon at any stage of the proceedings prior to the filing of the present petition, or is now involved, this Court is without jurisdiction to review the case on writ of certiorari.**

*People* v. *Parker,* 374 Ill. 524.

*Herndon* v. *Georgia,* 295 U. S. 441, 443.

*Hiawassee Power Co.* v. *Carolina-Tennessee Power Co.*, 252 U. S. 341, 343.

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*Hartford Life Insurance Company* v. *Johnson*, 249 U. S. 490, 492.

*Atlantic Coast Line Railroad Co.* v. *Mims*, 242 U. S. 532, 535.

*Cleveland & Pittsburgh Railroad* v. *City of Cleveland*, 235 U. S. 50, 53.

Rule 12, par. 1, and Rule 38, par. 2, of the Rules of the Supreme Court of the United States.

## II.

**The petitioner was properly found guilty and sentenced for obstructing justice and for contempt of court and was not deprived of due process of law, or of freedom of speech or of the press, or deprived of his right to petition the government for a redress of his supposed grievances.**

*Commonwealth* v. *McNary*, 246 Mass. 55; 140 N. E. 255, 29 A. L. R. 483.

Illinois Revised Statutes, 1939,
Chapter 38, Secs. 711-721;
Chapter 78, Secs. 16-19;
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*Lindquist* v. *Friedman's, Inc.*, 366 Ill. 232, 236.

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## ARGUMENT.

### I.

**Inasmuch as the record discloses that no federal question was raised, considered or passed upon at any stage of the proceedings prior to the filing of the present petition, or is now involved, this Court is without jurisdiction to review the case on writ of certiorari.**

The petition for certiorari filed herein should be denied because the record shows that petitioner did not at any time raise any federal questions prior to the filing of the petition with this court. Petitioner's answer in the trial court (Rec. 26-34) contains no reference whatsoever to the Constitution of the United States, any federal law, or any federal right thereunder. Petitioner's assignment of errors on appeal from the judgment of the trial court (Rec. 42) alleges no error based upon the determination of any federal question. The Supreme Court of the State of Illinois, 374 Ill. 524 (Rec. 44-48) made no mention of and did not pass upon any of the questions which petitioner seeks to have this court pass upon. The proceedings are in their entirety wholly devoid of any federal question.

It is well settled that this court does not have jurisdiction unless the federal questions raised in this petition have been asserted at the proper time, in the proper manner, and adjudicated by the State court.

*Herndon* v. *Georgia,* 295 U. S. 441 (1935), at page 443.

*Hiawassee Power Co.* v. *Carolina-Tennessee Power Company,* 252 U. S. 341 (1920), at page 343.

*Rooker* v. *Fidelity Trust Co.*, 261 U. S. 114 (1922), at page 116.

*Godchaux Company, Inc.* v. *Estopinal*, 251 U. S. 173 (1919).

*Hartford Life Insurance Company* v. *Johnson*, 249 U. S. 490 (1918), at page 492.

*Atlantic Coast Line Railroad Co.* v. *Mims*, 242 U. S. 532 (1917), at page 535.

*Cleveland & Pittsburgh Railroad* v. *City of Cleveland*, 235 U. S. 50 (1914), at page 53.

The petition should be denied for the further reason that it fails to set forth the statement disclosing the basis upon which petitioner contends this court has jurisdiction to review the judgment of which he complains, which statement is required by Rule 38, paragraph 2, and Rule 12, paragraph 1, of this court. The petition fails to specify the stage in the proceedings in the trial court or in the Supreme Court of the State of Illinois at which the federal questions sought to be reviewed were raised. It fails to specify the manner in which such questions were raised in said courts. It does not disclose the method by which they were raised or the way in which they were passed on by said courts. The petition contains no quotations of the record supporting any assertion that the rulings of said courts passed in any way upon such federal questions. Reference to the record referred to above discloses that it is impossible for petitioner to comply with the above-mentioned rules of this court because petitioners raised no federal questions.

## II.

**The petitioner was properly found guilty and sentenced for obstructing justice and contempt of court and was not deprived of due process of law, or of freedom of speech or of the press, or deprived of his right to petition the government for a redress of his supposed grievances.**

There are different rules in different States regarding the functions of grand juries and the right of citizens to petition a grand jury with respect to crimes or with respect to appearing before it. In *Commonwealth* v. *McNary,* 246 Mass. 55, 140 N. E. 255, 29 A. L. R. 483, the court declined to express opinion whether a mere communication to the grand jury would constitute contempt, but held that the communication in the case under consideration was a contempt because it attempted to instruct the grand jurors as to their duties in usurpation of the functions of the court.

In Illinois the grand jury system is similar to that at common law, with certain modifications by usage and statute (Ill. Rev. Stat., 1939, Chap. 38, Secs. 711-721; Chap. 78, Secs. 16-19). Private citizens having knowledge of crimes may communicate such knowledge to the court or to the state's attorney for presentation to the grand jury; or they may swear out a warrant before an examining magistrate who, if probable cause is found, shall bind the accused over to the grand jury (Ill. Rev. Stat., 1939, Chap. 37, Sec. 409; *idem* Chap. 38, Sec. 662; *Linquist* v. *Friedmans, Inc.,* 366 Ill. 232, 236; *Guthmann* v. *People,* 203 Ill. 260; *People* v. *Wilson,* 356 Ill. 256; *People* v. *Blenz,* 239 Ill. App. 318, 320). The Illinois rule laid down in the instant case and in previous cases seems to forbid "personal solicitation" of the grand jury or of "some of its members to obtain or prevent the indictment of parties." (374 Ill. 524, 528.)

But whether or not the Illinois rule goes so far, it is plain that the communications in this case sent to the grand jurors at their homes (Rec. 8-9; Rec. 20-22) containing "vicious and inflammatory" matter which are "replete with malignant accusations against private citizens and public officials" and which are "in all probability the result of personal enmity" (374 Ill. 524, 525, 529), are obstructions of justice. In addition, these communications instruct the grand jurors what they shall do.

Whether "a stranger has the right voluntarily to bring facts to the knowledge of a grand jury" (374 Ill. 524, 528) is not here directly involved. No stranger has the right to solicit the grand jurors at their homes with vicious, inflammatory, malignant communications,—the efforts of personal spite and enmity.

The "actual obstruction" principle, the "clear and present danger" principle and the "tendency" principle are not involved in this case. It is clear that if grand jurors are to be subjected in their homes to such malignancies, irrelevancies, spite and personal hostility, the functions of grand juries in Illinois will be subverted. It is not a case of "tendency" or "clear and present danger" which this Court has under consideration in the *Times-Mirror-Bridges* cases now pending before it; rather it is a case of direct interference analogous to solicitation of a petit jury to find verdict for or against one of the parties. We submit that the State of Illinois may guard its machinery of justice by the process of contempt analogously to the protection afforded grand juries of the United States (*Duke* v. *United States,* 60 Fed. (2nd) 840; 301 U. S. 492).

The Supreme Court of Illinois pointed out (374 Ill. 524, 527) "The criminal court found Parker guilty of 'acts and conduct directly calculated to impede, embar-

rass and obstruct the court in the due administration of justice.'" In affirming, the Supreme Court again said at page 529: "Rather they [Parker's letters to the grand jury] exposed the grand jury to the danger of being misled and abused by one motivated by personal animosity. If such communications with the grand jury were permitted and had their desired effect, many innocent people would be indicted solely because of personal enmity or the malice of one seeking revenge."

## CONCLUSION.

For the reasons above set forth, we respectfully pray that the Petition for a Writ of Certiorari be denied by this Honorable Court.

Respectfully submitted,

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